

EXHIBIT 1

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Court Dismisses Shareholder's 16(b) Complaint Based on Issuer's Prior Settlement with Insider

A judge in the Southern District of Colorado has held that an issuer's settlement of a Section 16(b) claim that had been brought to the issuer's attention by a shareholder precluded the shareholder from suing to recover a greater amount. See [Donoghue v. Bohemian Investments LLC](#). The case involved ten percent owners of Omni Bio Pharmaceuticals who purchased and later agreed to amendments to a convertible note and warrants. A plaintiff's attorney submitted a demand letter to Omni asserting that the amendments were simultaneous purchases and sales and, when matched with other transactions by the insiders, resulted in recoverable short-swing profits. The issuer responded to the demand letter by entering into a settlement with the insiders, without involving the plaintiff's attorney. The plaintiff's attorney filed a complaint alleging that the issuer settled for too little.

The insiders moved to dismiss the complaint on the ground that the settlement precluded the issuer from recovering any additional amount. The plaintiff's attorney responded that Section 29(a) of the Exchange Act prohibits an issuer from waiving compliance with any provision of the Exchange Act, and that an issuer therefore can't obstruct a shareholder's enforcement of a 16(b) claim by settling it directly with the insider. The court disagreed, noting that courts have held that Section 29(a) does not does not preclude issuers from settling or releasing a "fraud claim" where the claim had matured and was known to the issuer at the time of the settlement and was "genuinely disputed and uncertain."

I would be hesitant to read this case to mean that no privately settled 16(b) claim can be challenged by the plaintiffs' bar. The plaintiff did appeal, but Omni had gone out of business, and the parties subsequently agreed to a stipulation of dismissal of the appeal. The record doesn't indicate whether the parties reached another settlement or, instead, the plaintiff gave up.

Posted by Alan Dye at [9:04 am](#)

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